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UNITED STATES OF AMERICA

v.

DAVID M. HICKS

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) **PROSECUTION RESPONSE TO**  
) **DEFENSE MOTION**  
) **TO DISMISS CHARGE 3**  
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18 October 2004

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1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Position on Motion. The Defense Motion to Dismiss Charge 3 should be denied.

3. Overview. In its motion to dismiss, the Defense does not contest the validity of the offense of Aiding the Enemy under the Law of Armed Conflict. However, they assert that there is an added element to this recognized offense not listed under Commission Law – “allegiance to the United States.” They then attempt to show that the Accused did not owe such an allegiance. First, allegiance to the United States is not an element of this offense. Second, even if it were, evidence of whether the Accused did or did not owe such an allegiance would be a factual matter appropriately litigated during trial on the merits, not in a motion to dismiss for failure to state an offense. Accordingly, the Defense motion should be denied.

4. Facts

a. As the United States Supreme Court succinctly stated in *Hamdi v. Rumsfeld*<sup>1</sup>:

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these ‘acts of treacherous violence,’ Congress passed a resolution authorizing the President to ‘use all necessary and appropriate force against those nations, organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.’ Authorization for Use of Military Force (‘the AUMF’), 115 Stat 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.<sup>2</sup>

b. Australia is party to several treaties with the United States, including a mutual defense treaty among Australia, New Zealand, and the United States of September 1,

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<sup>1</sup> 124 S.Ct. 2633 (2004)

<sup>2</sup> *Id.* at 2635.

1951 (known as the “ANZUS Treaty”).<sup>3</sup> On September 14, 2001, the White House announced:

The Governments of Australia and the United States have concluded that Article IV of their mutual defense treaty applies to the terrorist attacks on the United States.

The United States welcomes Australia’s decision to join us in applying the ANZUS Treaty, which serves to reinforce the strong bonds of friendship and shared values that unite the American and Australian people. The tragic events of September 11, 2001 took place just one day after President Bush and Prime Minister Howard stood together in Washington, D.C. to commemorate the 50<sup>th</sup> anniversary of the U.S.-Australia alliance. Although our alliance with Australia was crafted under very different circumstances than exist now, the events of September 11, 2001 are a powerful reminder that the alliance and our shared commitments are no less valid today.

Australia shares our assessment of the gravity of the situation and is resolute in its commitment to work with the United States and all freedom loving people to combat international terrorism.

In the days and weeks to come, we will consult closely with our Australian allies regarding an effective response to these attacks.

White House Press Release of September 14, 2001. <sup>4</sup>

c. The international community immediately recognized the attacks of September 11, 2001 as an act of war, and invoked provisions of international treaties applicable to international armed conflict. *See, e.g.*, UN Security Council Resolution 1368 of 12 September 2001; NATO Press Release, 12 September 2001; White House Press Release, September 14, 2001.

d. War planning against the perpetrators of September 11, 2001 – al Qaida – began immediately following those attacks. On September 20, 2001, President Bush, in an address to the Joint Session of Congress and the American people,<sup>5</sup> noted that the September 11<sup>th</sup> attacks constituted “an act of war against our country.”<sup>6</sup> He also condemned the Taliban regime and put it on notice that it must either assist in bringing the terrorists to justice or “share in their fate.”<sup>7</sup> Warning the American public to expect

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<sup>3</sup> 3 U.S.T. 3420

<sup>4</sup> Available at [www.whitehouse.gov/news/releases/2001/09/20010914-12.html](http://www.whitehouse.gov/news/releases/2001/09/20010914-12.html)

<sup>5</sup> Address to a Joint Session of Congress and the American People of September 20, 2001, available at [www.whitehouse.gov/news/releases/2001/09/20010920-8.html](http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html)

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

“a lengthy campaign, unlike any other we have ever seen,”<sup>8</sup> the President delivered a message to the United States military: “Be ready. I’ve called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud.”<sup>9</sup>

e. Indeed, the September 11<sup>th</sup> attacks on the United States were an act of war, sparking the commencement of major combat operations in Afghanistan against the al Qaida network and the Taliban regime, known as Operation Enduring Freedom. But the war did not leap into existence on September 11, 2001. This war – declared and waged by al Qaida against the United States – has existed since the early 1990s.<sup>10</sup> As a federal court has said, “Certainly the terrorist attacks that have followed, if not preceded, the 1998 embassy bombings – the 1996 bombing of the military barracks at Khobar Towers, Saudi Arabia, the 2000 suicide attack on the U.S.S. Cole in Yemen, and most tragic and violent of all, the attacks on our own soil of the Pentagon, the World Trade Center, and in Pennsylvania – are sufficient to confirm the President’s assertion that a state of war exists between the United States and [al Qaida].” El-Shifa Pharmaceutical Industry Corporation. v. United States, 55 Fed. Cl. 751, at 771-772. (Fed. Cl. 2004).

f. On October 7, 2001, the President announced that on his orders, the U.S. military had “begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.”<sup>11</sup> Great Britain joined in this military action, and Australia, along with other allies, pledged forces “as the operation unfolds.”<sup>12</sup> By November 2001, the Australian Government had contributed troops and equipment to the Coalition.<sup>13</sup> Operations in Afghanistan continue,<sup>14</sup> as do worldwide operations against al Qaida.<sup>15</sup>

f. On November 13, 2001, the President issued a Military Order: “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”<sup>16</sup> In doing so, the President expressly relied on “the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and section 821 and 836 of title 10, United States Code.”<sup>17</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Final Report of the National Commission on Terrorist Attacks Upon the United States, Authorized Edition (2004), at 46, 48, 59.

<sup>11</sup> Presidential Address to the Nation of October 7, 2001, available at [www.whitehouse.gov/news/releases/2001/10/20011007-8.html](http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html).

<sup>12</sup> *Id.*

<sup>13</sup> CNN.com article, “Australian forces in key mop-up role,” September 4, 2002.

<sup>14</sup> *See, e.g.,*

<sup>15</sup> *See, e.g.,* Remarks as Delivered by Secretary of Defense Rumsfeld, New York City, New York, October 4, 2004 (the war against al Qaida “will likely go on for years”).

<sup>16</sup> 66 Fed. Reg. 222 (November 16, 2001)

<sup>17</sup> Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice (“UCMJ”). These sections provide, in relevant part:

**Art. 21. Jurisdiction of courts-martial not exclusive**

g. In his Order, the President found, *inter alia*, “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”<sup>18</sup> The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . .”<sup>19</sup> He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order.<sup>20</sup>

h. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority)<sup>21</sup> and over offenses (violations of the laws of war and all other offenses triable by military commission).<sup>22</sup> The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions . . . .”<sup>23</sup>

i. The General Counsel did so, issuing a series of Military Commission Instructions (MCIs), including MCI No. 2: Crimes and Elements for Trial by Military Commission.

j. On June 9, 2004, the Appointing Authority approved charges against the Accused, including, *inter alia*, Charge 3: Aiding the Enemy, which is an enumerated

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The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

**Art. 36. President may prescribe rules**

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

<sup>18</sup> *Id.*, Section 1(e)

<sup>19</sup> *Id.*, Section 2(a)

<sup>20</sup> *Id.*, Section 2(b)

<sup>21</sup> MCO No. 1, para. 3(A)

<sup>22</sup> *Id.*, paragraph 3(B)

<sup>23</sup> *Id.*, paragraph 8(A)

charge under MCI No. 2.<sup>24</sup> On June 25, 2004, the Appointing Authority referred this and the remaining charges to this Military Commission for trial.

k. The Prosecution concurs with the Defense that the Accused is an Australian citizen. He has never been a member of either the U.S. or Australian Armed Forces. The Prosecution concedes that the site of the Accused's alleged misconduct, Afghanistan, is not within territorial limits of the United States.

##### 5. Legal Authority Cited

- a. President's Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").
- b. Military Commission Order No. 1.
- c. Military Commission Instruction No. 2.
- d. Department of the Army Field Manual 27-10, July 1956.
- e. 10 U.S. Code §§ 821, 836 (Articles 21, 36, Uniform Code of Military Justice).
- f. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004).
- g. *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).
- h. *Ex Parte Quirin et al*, 317 U.S. 1, 31 (1942).
- i. *Colepaugh v. Looney*, 235 F.2d 429 (10<sup>th</sup> Cir. 1956), *cert. denied* 352 U.S. 1014 (1957).
- j. *Padilla v. Bush*, 233 F.Supp.2d 564, 592 (S.D.N.Y 2002).
- k. *United States v Lindh* 212 F.Supp.2d 541, 553 (E.D.V.A. 2002).
- l. Convention With Respect to the Laws and Customs of War on Land (Hague, II) Annex to the Convention, 29 July 1899.
- m. Hague Convention of 1907, Convention With Respect to the Laws and Customs of War on Land (Hague IV).
- n. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

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<sup>24</sup> MCI No. 2, para. 6(B)(3) and (4)

- o. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 12 August 1949.
- p. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
- q. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
- r. Charter of the International Military Tribunal, the Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany.
- s. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
- t. Statute of the International Tribunal for Rwanda, 33 I.L.M. (1994).
- u. Rome Statute of the International Criminal Court, 37 I.L.M. (1994).
- v. Adam Roberts & Richard, *Documents on the Laws of War* (3d ed. 2002).
- w. Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 Crim. L.F. 291 (2001).
- x. Black's Law Dictionary (6<sup>th</sup> ed. 1990).

## 6. Discussion

### a. Military Commission Instruction No. 2 is a Valid, Binding Instruction

(1) Execution of the war against al Qaida and the Taliban is within the exclusive province of the President of the United States pursuant to his powers as Executive and Commander in Chief under Article II of the United States Constitution.<sup>25</sup> The Congress, in passing the AUMF of 2001, expressly authorized the President to use “all necessary and appropriate force” against “nations, organizations, or persons he

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<sup>25</sup> *Ex Parte Quirin*, 317 U.S. 1, 26 (1942) “The Constitution confers on the President the ‘executive Power’, Art II, cl. 1, and imposes on him the duty to ‘take Care that the Law be faithfully executed.’ Art. II, 3. It makes him the Commander in Chief of the Army and Navy, Art. II, 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, 3, cl. 1.

determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,”<sup>26</sup> and it is the President’s duty to carry out this war.

(2) As a plurality of the Supreme Court just months ago held, “The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”<sup>27</sup> Furthermore, Congress, in enacting Articles 21 and 36 of the Uniform Code of Military Justice,<sup>28</sup> expressly recognized the President’s authority to use and to prescribe rules regarding military commissions. Thus, the President’s Military Order is a legitimate, recognized exercise of his Constitutional authority as Commander in Chief.

(3) As commissions are recognized to be the Executive Branch’s prerogative, it has been left to the Executive to determine appropriate guidelines for the conduct of military commissions. “[S]urely since *Ex parte Quirin*, . . . there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations.”<sup>29</sup>

(4) The Executive has issued his guidance with respect to the present military commissions in his Military Order. The Order directs that individuals subject to trial under the Order shall receive a “full and fair trial,”<sup>30</sup> and delegates the authority to promulgate further orders or regulations necessary to implement military commissions to the Secretary of Defense.<sup>31</sup> The Secretary of Defense further delegated the authority to issue regulations and instructions to the Department of Defense General Counsel.<sup>32</sup> It is pursuant to this authority that the Department of Defense General Counsel issued, among other instructions, MCI No. 2. This instruction is “declarative of existing law”<sup>33</sup> and details a number of offenses that “derive from the law of armed conflict.”<sup>34</sup>

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<sup>26</sup> Public L. No. 107-40, 115 Stat. 224 (2001)

<sup>27</sup> *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004), citing *Ex parte Quirin*, 317 U.S., at 28 (emphasis added). See also, *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

<sup>28</sup> 10 U.S.C. §§ 821,836 (1994). Congress takes notice of the law of war in this manner: “The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by *the law of war* may be tried by military commissions, provost courts, or other military tribunals.” [emphasis added]

<sup>29</sup> *Colepaugh v. Looney*, 235 F.2d 429 (10<sup>th</sup> Cir. 1956), *cert. denied* 352 U.S. 1014 (1957)

<sup>30</sup> PMO, Section 4(c)(2).

<sup>31</sup> *Id.*, Section 6(a).

<sup>32</sup> Pursuant to DoD MCO No. 1, Section 7. *Regulations A. Supplementary Regulations and Instructions*: The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President’s Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President’s Military Order. The General Counsel shall issue such instructions consistent with the President’s military order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

<sup>33</sup> MCI No. 2, para. 3(A).

<sup>34</sup> *Id.*

(5) This declarative instruction, which has a direct lineage to the President's authority to regulate the conduct of armed conflict, expressly lists "Aiding the Enemy" as an offense requiring proof beyond a reasonable doubt of the following elements:

- (a) The accused aided the enemy;
- (b) The accused intended to aid the enemy;
- (c) The conduct took place in the context of and was associated with armed conflict.<sup>35</sup>

(6) In the Comments section to Aiding the Enemy, MCI No. 2 states:

The requirement that conduct be wrongful for this crime *may* necessitate that, *in the case of a lawful belligerent*, the accused owe allegiance or some duty to the United States of American *or to an ally or coalition partner.*"

*Id.*, para. 6(B)(5)(b)(3)(emphasis added).

b. Allegiance to the United States is not an Element to Aiding the Enemy

(1) Hence, the Defense assertion that allegiance to the United States is an element of this offense is rebutted by MCI No. 2. Furthermore, in the case of an *unlawful* belligerent, as the Accused is alleged to be, allegiance is not even relevant. Acts of belligerency by an unprivileged belligerent are *per se* wrongful (*see* Prosecution Response to Defense Motion to Dismiss Charge 2). Thus, the Prosecution need not show any allegiance to the United States or to an ally or coalition partner to prove this offense. Furthermore, even were allegiance relevant, the facts are clear that the Accused did owe allegiance to Australia, an important ally and Coalition partner.

(2) As with other offenses listed in MCI No. 2, Aiding the Enemy existed as an offense long before the publication of MCI No. 2 or before the Accused's alleged acts. In fact, Aiding the Enemy is an offense explicitly recognized by Congress and triable by military commission. Article 104 of the Uniform Code of Military Justice states:

Any person who –

- (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or
- (2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or hold any intercourse with the enemy, either directly or indirectly; shall suffer death or such punishment as a court-martial **or military commission** may direct.

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<sup>35</sup> *Id.*, para. 6(B)(5)(a).



10 U.S. Code § 904.

(3) Hence, Aiding the Enemy is statutorily triable by military commission under the Uniform Code of Military Justice. Review of Manual for Courts-Martial (MCM) provisions pertaining to this offense is instructive. The elements of applicable subdivisions of Aiding the Enemy, as defined by the MCM, are as follows:

- (1) Aiding the Enemy.
  - (a) That the accused aided the enemy; and
  - (b) That the accused did so with certain arms, ammunition, supplies, money, or other things.
- ....
- (3) Harboring or protecting the enemy.
  - (a) That the accused, without proper authority, harbored or protected a person;
  - (b) That the person so harbored or protected was the enemy; and
  - (c) That the accused knew that the person so harbored or protected was an enemy.
- (4) Giving intelligence to the enemy.
  - (a) That the accused, without proper authority, knowingly gave intelligence information to the enemy; and
  - (b) That the intelligence information was true, or implied the truth, at least in part.
- (5) Communicating with the enemy.
  - (a) That the accused, without proper authority, communicated, corresponded, or held intercourse with the enemy; and
  - (b) That the accused knew that the accused was communicating, corresponding, or holding intercourse with the enemy.

MCM, 2000 ed., Part IV, para. 28(b).

(4) MCM Explanations provide the following:

(a) “This article denounces offenses by **all persons whether or not otherwise subject to military law**. Offenders may be tried by court-martial **or by military commission**.” *Id.*, para. 28(c)(1).

(b) “‘Enemy’ includes organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. ‘Enemy’ is not restricted to the enemy government or its armed forces.” *Id.*, para. 28(c)(2), 23(c)(1)(b).

(c) “A prisoner of war may violate this article . . . .” *Id.*, para. 28(c)(6)(a).

(d) “Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy.” *Id.*, para. 28(c)(6)(c).

(4) As noted by the Defense, the origins of the offense of Aiding the Enemy date back as far as 1775. See Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U.Balt.L.Rev. 49. Field Manual (FM) 27-10, which provides “authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land,” notes the offense of Aiding the Enemy, tracking the exact language of modern-day Article 104. FM 27-10, *The Law of Land Warfare*, 18 July 1956.

(5) Despite this element not appearing in either MCI No. 2 or Article 104 of the UCMJ, or any of its precursors, the Defense asserts, “The critical element of the offense of aiding the enemy is the breach of the duty of allegiance to the United States.” This assertion is wholly unsupported; in fact, it crumbles if one examines the authorities cited in the Defense’s footnotes purportedly in support of this notion. The offense of aiding the enemy did not “predate[] the American crime of treason.” It has continuously existed in the Articles of War entirely separate from it. The Defense then cites the treason statute of 1790 and a federal case regarding treason, both wholly inapposite to this case.

(6) The case of *United States v. Olson*, 22 C.M.R. 250 (C.M.A. 1950), nowhere holds or implies that there was a requirement that there be a breach of allegiance to the United States for the offense of aiding the enemy. The Court in *Olson* only mentions the crime of treason to note, “We are well aware of the fact that some Federal courts, in an analogous line of cases involving the crime of treason, have expressed views which might lead to a different conclusion” regarding whether communication of an idea can constitute an overt act. *Id.* at 256 – 257. This highlights the fact that treason is an “analogous line of cases” distinguishable from the crime of aiding the enemy. Furthermore, not only does the *Olson* court not state that allegiance to the United States is an element, but they speak to the sweeping nature of the offense: “Article of War 81 provides that ‘Whosoever relieves or attempts to relieve the enemy’ commits an offense under the Article, and the Code is just as sweeping, for it punishes ‘any person’ who aids the enemy.” *Id.* at 255.

(7) As noted by the Defense, in one of the most famous Commission cases, *Ex Parte Quirin*, 317 U.S. 1 (1942), the Accused were charged with and convicted of aiding the enemy. The United States Supreme Court, prior to announcing their full opinion, expressly held in a *per curiam* decision that aiding the enemy, along with the other charges, stated offenses “which the President is authorized to order tried before a military commission.” *Id.* Contrary to the Defense assertion, *Quirin* does **not** support the notion that allegiance to the United States is required for the offense. The Specification in question read as follows:

Charge II: Violation of the 81<sup>st</sup> Article of War

Specification: In that, during the month of June, 1942, the prisoners, Ernst Peter Burger . . . Richard Quirin, and Werner Thiel, being enemies of the United States and acting for and on behalf of the

German Reich, a belligerent enemy nation, and without being in the uniform of the armed forces of that nation, relieved or attempted to relieve enemies of the United States with arms, ammunition, supplies, money, and other things, and knowingly harbored, protected and held correspondence with and gave intelligence to enemies of the United States by entering the territorial limits of the United States, in the company of other enemies of the United States, with explosives, money and other supplies with which they relieved each other and relieved the German Reich, for the purpose of destroying and sabotaging war industries, transportation facilities or war materials of the United States, and by harboring, communicating with, and giving intelligence to each other and to other enemies of the United States in the course of such activities.

Transcript of Proceedings before the Military Commission to Try Persons Charged with offenses against the Law of War and the Articles of War, Washington, D.C., July 8 to July 31, 1942 (transcribed by University of Minnesota students, Minneapolis, Minnesota, 2004, Joel Samaha, Sam Root, Paul Sexton, eds).<sup>36</sup>

(8) It can hardly be gleaned from the above that “allegiance to the United States” was either alleged or a “central element” as claimed by the Defense. In fact, *Quirin* makes clear that an unlawful enemy combatant, neither a citizen nor owing any duty of allegiance to the United States, can be guilty of the offense of Aiding the Enemy.

(9) Allegiance to the United States is not an element of this offense. Accordingly, the Defense Motion should be denied.

7. Attached Files. None.

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses/Evidence. As the Defense’s motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//

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Lieutenant Colonel, U.S. Marine Corps  
Prosecutor

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<sup>36</sup> Available at [www.soc.umn.edu/~samaha/nazi\\_saboteurs/nazi01.htm](http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm)